Filed 1/15/13 P. v. Sanders CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent

v.

MAURICE D. SANDERS,

Defendant and Appellant.

F059287

(Super. Ct. No. BF126309A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Two shotguns were found in the master bedroom closet of the apartment where appellant Maurice D. Sanders resided with his wife. Appellant was convicted after jury trial of two counts of unlawfully possessing a firearm after conviction of a felony (counts 1 & 3; former Pen. Code, § 12021, subd. (a)(1))[1] and two counts of possessing a firearm after conviction of a specified violent offense (counts 2 & 4; former § 12021.1, subd. (a)).[2] All four counts were based on his simultaneous possession of two firearms. The court found four prior strike allegations and three prior prison term allegations to be true. (§§ 667, subds. (a)-(e), 1170.12, 667.5, subd. (d).) Appellant was sentenced on counts 1 and 3 to 25-years-to-life imprisonment; the term imposed on count 3 was ordered to run concurrently with the term imposed on count 1. He was sentenced to terms of 25-years-to-life imprisonment on counts 2 and 4 but imposition of punishment was stayed pursuant to section 654. The court struck all of the prior prison term enhancements.

Appellant appealed the judgment. This court held that the corpus deliciti of the offenses were adequately established. We also held that counts 2 and 4 must be reversed because the violations of section 12021.1 are lesser included offenses of the violations of section 12021 (counts 1 and 3), and that the term imposed for count 3 must be stayed pursuant to section 654.

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[1] Unless otherwise specified all statutory references are to the Penal Code.

[2] "Former section 12021(a)(1) was repealed operative January 1, 2012, but its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). [Citations.] Former section 12021.1(a) was repealed and reenacted as section 29900, subdivision (a)(1) without substantive change. [Citation.] Because defendant was convicted under the repealed statutes, and they were only renumbered without substantive change, we refer to former sections 12021(a)(1) and 12021.1(a) throughout this opinion for clarity and convenience. For brevity, we will generally not use the word 'former.'" (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2 (*Sanders*).)

Appellant filed a petition for review in the California Supreme Court challenging the sufficiency of the evidence. The petition for review was denied. On its own motion, the Supreme Court granted review limited to the following two issues: "'(1) Is possession of a firearm after conviction of a specified violent offense (Pen. Code § 12021.1, subd. (a)) a necessarily included offense of possession of a firearm after conviction of a felony (Pen. Code, § 12021, subd. (a)(1))?' and '(2) Was defendant properly sentenced to concurrent terms for his simultaneous possession of two firearms in violation of Penal Code section 12021, subdivision (a)(1)?'" (*Sanders, supra,* 55 Cal.4th at p. 735.)

On November 19, 2012, the Supreme Court decided *Sanders, supra*, 55 Cal.4th 731. *Sanders* held "that neither section 12021(a)(1) nor section 12021.1(a) is a necessarily included offense of the other, because it was possible to commit either offense without committing the other." (*Id*. at p. 741.) Therefore, "the rule against multiple convictions for necessarily included offenses does not bar defendant's separate convictions for violating both sections based on possession of the same weapon. The Court of Appeal erred in reversing defendant's convictions on counts two and four." (*Ibid.*) *Sanders* also held that appellant "may be separately punished for two violations of section 12021(a)(1) and of section 12021.1(a) based on his simultaneous possession of two firearms." (*Id*. at p. 745.) Yet, appellant "may not be separately punished for violations of sections 12021(a)(1) and 12021.1(a) based on possession of the same firearm." (*Ibid*.) The Supreme Court reversed our judgment insofar as we reversed the two convictions and ordered the sentence on count 3 to be stayed. It remanded the matter to this court for further proceedings consistent with its opinion.

Following and applying the Supreme Court's guidance, we will affirm all of the convictions. We will modify the sentence as follows: (1) execution of the sentences imposed for counts 1 and 3 will be ordered stayed pursuant to section 654; and (2) the

stay on execution of the sentences imposed for counts 2 and 4 will be lifted. So modified, the judgment will be affirmed.

FACTS

On January 14, 2009, Bakersfield Police Officers Paul Yoon and Stephen Kauffman contacted appellant. Appellant told them he lived with his wife somewhere in downtown Bakersfield but he did not know his address or phone number.

A parole search was conducted of appellant's person. He possessed a key ring containing, inter alia, a car key and a house key. The car key fit the ignition of a vehicle parked nearby. Inside the vehicle, officers found a bank statement addressed to Tamu Tenison at an apartment in Bakersfield (the Bakersfield apartment).

Officer Kauffman telephoned Tamu, who said she was married to appellant in December 2008.

Appellant telephoned Tamu. During their conversation, appellant said, "Baby, remember when I brought the thing into the house, you asked me about it? I told you not to worry about it. It was some guns."

Some Bakersfield police officers, including Officer Kauffman and Officer Joshua Finney, arrived to search the Bakersfield apartment. Kauffman opened the front door using one of the keys on appellant's key ring. During a protective sweep of the apartment, officers noted the door of the master bedroom closet was open. Two shotguns were found in the master bedroom closet, along with several 20-gauge and 12-gauge shotgun shells. The shotguns were in plain view. Although one of them was covered, it was still identifiable as a firearm. One of the shotguns was a 12-gauge pump-action type and the other was a 20-gauge bolt action type. Both shotguns were operable.

A duffel bag was found resting on the ground in the master bedroom. It contained men's clothing and a letter from the Department of Corrections and Rehabilitations addressed to appellant at an address in Palmdale. A photograph of appellant was found in the living room. A photograph of appellant and Tamu was found in the master bedroom.

The field arrest data sheet reflects that appellant gave the Bakersfield address as his residence. Appellant told Officer Finney he stays at the Bakersfield apartment with Tamu when he is in Bakersfield but he lives in Palmdale.

Appellant gave a statement to Officer Finney. In relevant part, appellant said he was married to Tamu but did not live with her. Appellant said he purchased the shotguns for Bakersfield Police Officer Mason Woessner. Appellant said that he had been stopped by Woessner and had made a deal with him to find information for him in exchange for getting some unrelated charges dismissed. Appellant said he purchased the guns from a "crack head" on the day of his arrest.

Officer Woessner testified on December 30, 2008, he stopped a vehicle driven by Tamu in which appellant was a passenger. Appellant initially gave Woessner a false name. He told Woessner he wanted to "work off" the situation by becoming a confidential informant concerning drugs and firearm possession. Woessner did not ask appellant to purchase firearms for him and did not say anything that would have led appellant to believe that Woessner wanted him to do so. Appellant never indicated to Woessner that he was going to purchase some firearms. Appellant did not tell Woessner he had purchased the shotguns.

It was stipulated that appellant was convicted of a felony within the meaning of sections 12021 and 12021.1 prior to January 14, 2009.

Appellant's sister-in-law, Danyell Sanders, testified appellant lived in Palmdale with appellant's brother and her.

Appellant testified he lived in Palmdale at the time of his arrest. Appellant further testified Officer Woessner telephoned him several times. During one of their conversations, Woessner offered to pay appellant $75 to $100 for shotguns and $100 to $300 for fully automatic weapons. Tamu listened to this conversation. She bought the shotguns. She thought that if appellant gave Woessner what he wanted, he would stop telephoning appellant.

DISCUSSION

I. The Corpus Delicti of the Offenses was Adequately Proven.

A. The corpus delicti rule.

> "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.] Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*).)

The corpus delicti "rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1169.) "[T]he rule in California has been that one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or purpose to commit it." (*Id.* at p. 1171.)

The corpus delicti rule is not onerous. In California, it only "require[s] some independent proof of the corpus delicti itself, i.e., injury, damage, or loss by a criminal agency. [Citation.]" (*Alvarez, supra,* 27 Cal. 4th at p. 1169, fn. 3.) "A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.)

> "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be

considered for their full value to strengthen the case on all issues. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1171.)

The corpus delicti rule applies in various contexts. "[A]ppellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1170.) When such a claim is raised, the entire record is reviewed to determine if it contains some evidence, independent of the defendant's extrajudicial statements, from which one could reasonably infer that a crime was committed. (See, e.g., *People v. Morales* (1989) 48 Cal.3d 527, 553; *People v. Wright* (1990) 52 Cal.3d 367, 403-405.)

B. The evidence adequately establishes the corpus delicti of the charged crimes.

Appellant contends all four convictions must be reversed because "no sufficient prima facie showing was made regarding the elements of possession (custody or control) and knowledge." We are not convinced.

When a defendant is charged with violating section 12021, the corpus delicti rule requires slight proof of "(1) conviction of a felony and (2) ownership or possession of a firearm. [Citation.]" (*People v. Hilliard* (1963) 221 Cal.App.2d 719, 724; § 12021, subd. (a)(1).) Section 12021.1 adds the requirement that the defendant has been previously convicted of a specified violent felony. (§ 12021.1, subd. (b).)

Appellant acknowledges that he stipulated to having suffered three prior felony convictions of moral turpitude. Therefore, we must determine only whether there is slight or minimal evidence supporting a reasonable inference that appellant knowingly possessed the shotguns. The record contains such evidence.

> "Possession may be actual or constructive. Actual possession means the object is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the weapon. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.] Possession of a weapon may be proven circumstantially,

and possession for even a limited time and purpose may be sufficient. [Citation.]" (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.)

Constructive "'possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.' [Citation.]" (*People v. Johnson* (1984) 158 Cal.App.3d 850, 854.)

It is undisputed that Tamu lived at the Bakersfield apartment. She told officers she married appellant in December 2008. Appellant possessed a key to the front door of the Bakersfield apartment. There were two photographs of appellant in the Bakersfield apartment, one was in the living room and the other was in the master bedroom. A duffle bag containing men's clothing and paperwork addressed to appellant was found in the apartment. This evidence is sufficient to permit a reasonable inference that appellant resided at the Bakersfield apartment with his wife.

Two shotguns were found inside the master bedroom closet of the Bakersfield apartment. The closet's door was open and shotguns were in plain view. Although one was covered, it was still recognizable to officers as a firearm. Officer Yoon testified, "They were partially wrapped up in a blanket leaned up against the closet. I could see the tubes of the shotguns and a butt stalk of one of the shotguns." The duffle bag, which contained paperwork addressed to appellant, was found resting on the floor of the master bedroom. A photograph of appellant and Tamu was found in the master bedroom. This evidence is sufficient to support a prima facie inference that appellant used the master bedroom, including the master bedroom closet, and he possessed and had knowledge of the shotguns.

We therefore conclude the corpus delicti rule was satisfied; this challenge to the sufficiency of the evidence fails.[3]

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[3] Respondent contends this issue was forfeited by the absence of an objection on this ground below. Our Supreme Court has not "suggested that an evidentiary objection

II. Counts 2 and 4 are Not Necessarily Included Offenses of Counts 1 and 3.

Appellant contends that counts 2 and 4 must be reversed because the violations of section 12021.1, subdivision (a), are lesser included offenses of the violations of section 12021, subdivision (a). The Supreme Court resolved this issue adverse to appellant's position.[4] It held that "neither section 12021(a)(1) nor section 12021.1(a) is a necessarily included offense of the other, because it was possible to commit either offense without committing the other. [Citation.] Accordingly, the rule against multiple convictions for necessarily included offenses does not bar defendant's separate convictions for violating both sections based on possession of the same weapon." (*Sanders, supra,* 55 Cal.4th at p. 741.) Thus, appellant was properly convicted for the simultaneous possession of two firearms of two counts of violating section 12021, subdivision (a)(1) and two counts of section 12021.1, subdivision (a). (*Sanders, supra,* at p. 741.)

III. Section 654 Does Not Preclude Imposition of Separate Punishment For Each Firearm that Appellant Illegally Possessed.

The probation report recommended a term of 25-years-to-life be imposed for count 3 (possession of the 12-gauge shotgun). It also recommended this term run

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at trial is a prerequisite to raising *instructional* and *sufficiency* claims on appeal." (*Alvarez, supra*, 27 Cal.4th at p. 1172, fn. 8.) However, a split has developed in the appellate courts on the question whether "the defendant must either give the prosecution trial notice of his insistence on independent proof or forfeit the benefit of the independent-proof rule entirely. [Citations.]" (*Ibid*.) Since we have determined the corpus delicti rule was satisfied, it is unnecessary to address the question of forfeiture. The point is moot.

[4] Respondent conceded this point when the matter was initially briefed in this court and we accepted the concession as properly made. In the Supreme Court, both parties "agree[d] that the rule against multiple convictions based on necessarily included offenses bars separate convictions under both sections for possession of the same gun." (*Sanders, supra*, 55 Cal.4th at p. 736.) They disagreed about which offense is necessarily included in the other. (*Ibid*.) The Supreme Court explained that "[b]oth arguments fail. Neither offense is necessarily included in the other." (*Id*. at p. 737.)

concurrently with the term imposed for count 1 (possession of the 20-gauge shotgun). The trial court sentenced appellant in accordance with both of these recommendations. The trial court also imposed terms of 25-years-to-life for counts 2 and 4 but stayed execution of these terms under section 654.

Appellant argues the term that was imposed for count 3 must be stayed pursuant to section 654. The Supreme Court rejected this argument in *Sanders, supra,* 51 Cal.4th 731. It explained that in *People v. Correa* (2012) 54 Cal.4th 331, it had "announced, *as a new rule*, that section 654 does not bar multiple punishments for violations of the same provisions of law." (*Sanders, supra,* at p. 742, italics added.) The *Sanders* court further explained that "the Legislature had specifically exempted section 12021(a)(1) from the application of section 654 in circumstances where a defendant is found in possession of several firearms." (*Sanders, supra*, at p. 742.) "'[T]he magnitude of a felon's culpability depends on the number of weapons he or she possesses.'" (*Ibid*.) Therefore, appellant's "two convictions for violating section 12021(a)(1), based on his simultaneous possession of *two firearms*, are exempt from section 654's application because the Legislature intended that the possession of 'each firearm … shall constitute a distinct and separate offense …' under that statute. (§ 12001, subd. (k).) The same is true of [appellant's] two convictions for violating section 12021.1(a). (§ 12001, subd. (k).)" (*Sanders, supra,* at p. 743.)

Yet, appellant "may not be separately *punished* for violations of sections 12021(a)(1) and 12021.1(a) based on his possession of the *same firearm*, even though multiple *convictions* for both offenses were proper." (*Sanders, supra,* 55 Cal.4th at p. 743.) The punishment for violating section 12021.1, subdivision (a) provides for the longest potential term of imprisonment. Therefore, "[i]t would have contravened legislative intent to stay execution of sentence on a section 12021.1(a) conviction in favor of imposing sentence on a section 12021(a)(1) conviction." (*Sanders, supra,* at pp. 744-745.)

Based on the foregoing reasoning, the Supreme Court held:

> "[Appellant] may be separately punished for two violations of section 12021(a)(1) and of section 12021.1(a) based on his simultaneous possession of two firearms. The Court of Appeal erred in concluding otherwise. However, we also hold that defendant may not be separately punished for violations of section 12021(a)(1) and 12021.1(a) based on possession of the same firearm. While the trial court correctly recognized this point, it incorrectly stayed execution of sentence on the wrong offenses (§ 12021.1(a))." (*Sanders, supra*, 55 Cal.4th at p. 745.)

The Supreme Court remanded this matter for further proceedings consistent with its opinion. Since the trial court stayed execution of the sentences imposed on counts 2 and 4 and the Supreme Court determined that it "incorrectly stayed execution of sentence on the wrong offenses," we conclude that the Supreme Court directed this court to lift the stay on those counts and to stay the execution of the sentence that was imposed on counts 1 and 3. (*Sanders, supra*, 55 Cal.4th at p. 745.)

DISPOSITION

The convictions are affirmed. The sentence is modified as follows: (1) execution of the sentences imposed on counts 1 and 3 is stayed pursuant to Penal Code section 654; and (2) the stay of execution of the sentences imposed on counts 2 and 4 is lifted. As modified, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and to transmit a copy of it to the appropriate authorities and the parties.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL, J.